

The monitoring program proposed in the LAR is comprised of two distinct pieces: (1) Alkali-Silica Reaction (“ASR”) Expansion Monitoring; and (2) Structural Deformation Monitoring.³ The scope of the contention at issue in this proceeding is restricted to issues pled by C-10 in its Hearing Request and Petition to Intervene,⁴ and admitted by the Board in LBP-17-7.⁵ As explained further below, the admitted contention challenges *only* the ASR Expansion Monitoring portion of the LAR. The Board explicitly acknowledged the distinction between the two aspects of the monitoring program and noted that C-10’s Petition “does not challenge” the Structure Deformation Monitoring portion of the LAR.⁶

Recent filings by C-10, however, indicate that it may improperly attempt to challenge the Structure Deformation Monitoring piece of the LAR at the upcoming hearing. More specifically, C-10 recently filed with the Commission an “Emergency Petition” containing various requests and demands related to: this LAR proceeding, the previously-terminated Seabrook license renewal proceeding, various Staff actions, and other issues related to rulemaking and generic Commission determinations.⁷ As an attachment to their Emergency Petition, C-10 filed a report prepared by Dr. Victor Saouma (“Saouma Report”).⁸ The Saouma Report offered commentary on various aspects of the LAR, but focused in particular on the Structure Deformation

³ Compare Original LAR § 3.5.1 with *id.* § 3.5.2.

⁴ C-10 Research and Education Foundation, Inc., “Petition for Leave to Intervene: Nuclear Regulatory Commission Docket No. 50-443” (Apr. 10, 2017) (ML17100B013) (“Petition”).

⁵ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-17-7, 86 NRC 59 (2017), *aff’d*, CLI-18-4, 87 NRC 89 (2018).

⁶ *Seabrook*, LBP-17-7, 86 NRC at 124.

⁷ See generally Emergency Petition by C-10 Research and Education Foundation for Exercise of Commission’s Supervisory Authority to Reverse No Significant Hazards Determination and Immediately Suspend License Amendment and License Renewal Decisions (Feb. 13, 2019) (ML19044A768).

⁸ *Id.*, Attach. 1, Ex. 4, V. Saouma, “Review of Selected Documents Pertaining to the Structural Evaluation of Seabrook Nuclear Power Plant” (Feb. 12, 2019) (Proprietary).

Monitoring portion of the LAR that C-10 “d[id] not challenge” in its Petition. In fact, nearly half of the report is devoted to challenging “Finite Element Analyses,” which are only part of the Structure Deformation Monitoring piece of the LAR.⁹ NextEra noted in its Answer pleading that such arguments were beyond the scope of the contention admitted for hearing.¹⁰ But in its Reply, C-10 stated that it “does not concede that [Dr. Saouma’s Structure Deformation Monitoring critiques] fall outside the scope of the LAR proceeding.”¹¹

C-10 has identified Dr. Saouma as its expert witness for the upcoming hearing, apparently replacing C-10’s former expert Paul Brown (on whom C-10 relied exclusively for its original proposed contentions).¹² C-10 also recently confirmed that it does not plan to submit new or amended contentions regarding the Nuclear Regulatory Commission (“NRC”) Staff’s final Safety Evaluation of March 11, 2019.¹³ Accordingly, despite the long-established scope of this proceeding, NextEra has a good faith belief that C-10 intends to submit testimony and exhibits from Dr. Saouma purporting to challenge the Structure Deformation Monitoring portion of the LAR.¹⁴

⁹ *See id.* at 9-18.

¹⁰ NextEra’s Answer Opposing C-10’s Emergency Petition at 3-4 (Feb. 25, 2019) (ML19056A586).

¹¹ C-10 Research and Education Foundation’s Reply to Oppositions by NextEra and NRC Staff to Emergency Petition for Exercise of Commission’s Supervisory Authority to Reverse No Significant Hazards Determination and Immediately Suspend License Amendment and License Renewal Decisions at 8 n.6 (Mar. 1, 2019) (ML19060A304).

¹² *See* Letter from N. Treat to P. Bessette and A. Ghosh, Monthly Disclosure: Addition of expert Victor E. Saouma and request for access to protected information, Pursuant to 10 C.F.R. § 2.336; NextEra Energy Seabrook, LLC (Seabrook Station Unit 1), Docket No. 50-443-LA-2 (Oct. 24, 2018) (ML18297A149).

¹³ Letter from D. Curran to ASLB, Seabrook License Amendment Proceeding, Docket No. 50-443 LAR (Mar. 29, 2019) (ML19088A202).

¹⁴ NextEra acknowledges that Dr. Saouma prepared his report for the Emergency Petition and, therefore, may not have intended to limit his opinions to (or even have been aware of) the scope of the admitted contention in this proceeding. Likewise, C-10’s new counsel was not involved in the preparation of the Petition and did not represent C-10 at the time LBP-17-7 was issued. Thus, C-10’s counsel also may not have been fully aware of the scope of the admitted contention. Nevertheless, based on C-10’s statements and the prevalence of the out-of-scope arguments in the Saouma Report, NextEra believes the instant Motion is both necessary and prudent.

Accordingly, because such challenges were never raised by C-10 in its original Petition or by its former expert, never responded to by NextEra or NRC Staff, and never addressed (or admitted) by the Board, NextEra requests the Board to issue an order *in limine* excluding from the record all testimony and exhibits purporting to challenge the Structure Deformation Monitoring portion of NextEra’s LAR. NextEra believes an order *in limine* is appropriate at this time because the alternative—*i.e.*, waiting to see whether C-10 *actually does* file irrelevant testimony on Structure Deformation Monitoring—would introduce unnecessary prejudice and inefficiency into the hearing process. Delaying resolution of this matter could: (1) permit C-10 to expend resources developing irrelevant testimony; (2) cause NextEra and NRC Staff to expend resources responding to irrelevant testimony (during the pendency of a motion to strike); and (3) cause the Board to expend resources reviewing irrelevant materials (developed before the motion to strike was resolved). These inefficiencies can be avoided through the issuance of an order *in limine* well in advance of the testimony submission deadlines.

II. LEGAL STANDARDS

The NRC’s procedural rules—specifically, 10 C.F.R. § 2.337(a), which governs the admissibility of evidence—provide that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” Thus, pursuant to 10 C.F.R. § 2.319(e), the Board is empowered to “restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments” from the record.

Additionally, recent Commission decisions confirm that intervenors are not permitted to unilaterally alter the scope of an admitted contention. For example, in *Vogle*, the Commission upheld a Board ruling excluding testimony that strayed beyond the scope of the original contention and bases, as pled and admitted, because the limitations in the initial pleadings

“defined the scope of the . . . contention.”¹⁵ Similarly, in *Pilgrim*, the Commission reiterated this longstanding precedent:

NRC threshold contention standards require petitioners to review application materials and set forth their contentions “with particularity.” *Where any issue arises over the proper scope of a contention, “NRC opinions have long referred back to the bases set forth in support of the contention.”* . . . Our contention rules require “‘reasonably specific factual and legal’ allegations at the outset” to assure that matters admitted for hearing . . . provide notice to opposing parties of the issues they will need to defend against.¹⁶

Intervenors certainly are not required to prove their case, or even to provide an exhaustive list of possible bases, at the contention admissibility stage.¹⁷ However, they “may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset. . . . [We] do not allow distinctly new complaints to be added at will as litigation progresses.”¹⁸

On occasion, licensing boards have noted that they “admit contentions, not bases.”¹⁹ However, such statements merely acknowledge the ability of intervenors to further develop existing challenges to the portions of the application disputed in the original petition. But 10 C.F.R. § 2.309(f)(1)(vi) has long been held to require petitioners to specify—at the petition stage—the *portions* of the application that are being disputed.²⁰ Thus, the Commission has

¹⁵ *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-02 (2010).

¹⁶ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 308-09 (2010) (citations omitted).

¹⁷ *La. Energy Servs., LP* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

¹⁸ *Id.* at 309 (citation and internal quotation marks omitted).

¹⁹ *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-2, 73 NRC 28, 56 (“The Board admits contentions, however, and not their supporting bases.”); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order (Granting in Part and Denying in Part Applicant’s Motions *in Limine*) (Mar. 6, 2012) (unpublished) (ML12066A170) (“the Board notes that we admit contentions, not bases.”).

²⁰ *Ga. Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 41 (1993). *See also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381 (2005).

consistently and explicitly rejected the notion of admitting “contentions, not bases” as legally erroneous to the extent it is cited as justification for allowing intervenors to unilaterally expand the scope of their admitted contentions (*i.e.*, to challenge new portions of the application) without regard to their original bases.²¹ At bottom, the binding decisions in *Vogtle* (CLI-10-5), *Pilgrim* (CLI-10-11), and *Seabrook* (CLI-12-05), forbid the consideration of evidence that strays beyond the specific bases of a contention *as pled and admitted*.

III. EVIDENCE OFFERED FOR THE PURPOSE OF CHALLENGING THE STRUCTURE DEFORMATION MONITORING PORTION OF THE LAR SHOULD BE EXCLUDED

As discussed below, any testimony and exhibits offered for the purpose of challenging the Structure Deformation Monitoring portion of NextEra’s LAR, including but not limited to portions of the Saouma Report, should be excluded from the evidentiary record. Such evidence is beyond the scope of the contention as pled and admitted, and therefore is irrelevant to the instant proceeding. Thus, it is entirely appropriate for the Board to re-confirm its ruling in LBP-17-7 regarding the scope of the admitted contention, and to exercise its authority under 10 C.F.R. § 2.319(e) to issue an *in limine* order excluding such irrelevant evidence. Indeed, the interests of efficiency are served by proactively issuing such an order to eliminate extraneous, irrelevant material “which would otherwise ‘clutter up’ the [hearing].”²²

A. ASR Expansion Monitoring and Structure Deformation Monitoring Are Two Separate and Distinct Components of the LAR

As explained in the LAR, NextEra’s proposed methodology consists of two distinct monitoring activities: (1) “periodic measurement of ASR expansion,” (*i.e.*, ASR Expansion

²¹ See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 310 n.50 (“We remind our boards, however, of the need to specify each basis relied upon for admitting a contention. . . . Contrary to the Board’s statement (LBP-11-2, 73 NRC at 56), an admitted contention is defined by its bases.”).

²² *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986).

Monitoring), and (2) “periodic inspections of ASR-affected structures to identify and trend building deformation,” (*i.e.*, Structure Deformation Monitoring).²³ As explained further in Section III.B below, the contention (as pled and admitted) challenges *only* the ASR Expansion Monitoring portion of the LAR.

The LAR summarizes ASR Expansion Monitoring in Section 3.5.1. Stated briefly, the ASR Expansion Monitoring portion of the LAR uses combined crack width indexing and extensometer deployment to track concrete expansion, and establishes acceptance criteria to benchmark ASR expansion.²⁴ NextEra developed the ASR Expansion Monitoring methodology and acceptance criteria with the assistance of its contractor, MPR Associates, Inc. (“MPR”). The ASR Expansion Monitoring methodology derives to a significant extent from the Large-Scale Test Programs conducted for NextEra by MPR and their subcontractor, the Ferguson Structural Engineering Laboratory (“FSEL”) at The University of Texas at Austin.²⁵ The ASR Expansion limits for structural limit states, and acceptance criteria and monitoring frequencies, are provided in Tables 4 and 5 of the LAR, respectively.²⁶

On the other hand, the LAR summarizes Structure Deformation Monitoring in Section 3.5.2. In a nutshell, this component of the LAR classifies structures based on complexity of the structural analysis (as opposed to expansion), and then identifies corresponding monitoring intervals.²⁷ The parameters to monitor and the associated threshold limits are determined based on the structural analyses and are building-specific. NextEra developed the Structure

²³ Original LAR § 3.5.

²⁴ *See id.* § 3.5.1.

²⁵ *See generally id.* § 3.2.

²⁶ *Id.* § 3.5.1.

²⁷ *Id.* § 3.5.2.

Deformation Monitoring methodology with the assistance of its contractor, Simpson Gumpertz & Heger (“SG&H”).²⁸ The Structure Deformation Monitoring stages, intervals, and evaluation types are specified in Table 6 of the LAR.²⁹

B. The Contention As Pled by C-10 and Admitted by the Board in LBP-17-7 Challenges Only the ASR Expansion Monitoring Component of the LAR

In its original Petition, C-10 proposed ten contentions. The Petition was focused on challenging the ASR Expansion Monitoring portion of the LAR. Specifically, C-10 challenged the “representativeness” of the data from the FSEL testing program, which was an input to the *expansion* monitoring methodology. But the Petition did not offer a single criticism of the analyses proposed for evaluating structural *deformation*. Indeed, the word “deformation” only appears twice in the entire Petition. And both instances are merely passing references; neither is in the context of a challenge to the Structure Deformation Monitoring methodology. Moreover, the term only appears in the discussion of Contention G,³⁰ and C-10’s visual inspections arguments in Contention A,³¹ both of which the Board rejected as inadmissible.³²

Furthermore, while the Petition included multiple references to NextEra contractors MPR and FSEL (which helped develop the ASR Expansion Monitoring portion of the LAR), it did not, even once, acknowledge or reference SG&H (which helped develop the Structure Deformation Monitoring portion of the LAR) or any supporting documents prepared by SG&H. In other

²⁸ See generally *id.* § 6.0 (referencing SG&H reports on “Computation of Load Factors” (item 17), “Development of ASR Load Factors” (item 23), and “Evaluation and Design Confirmation of As-Deformed [containment]”).

²⁹ *Id.* § 3.5.2.

³⁰ Petition at 3.

³¹ *Id.* at 14

³² *Seabrook*, LBP-17-7, 86 NRC at 95 (“We conclude that Contention A is inadmissible to the extent it concerns visual inspections”); *id.* at 135 (“Contention G is not admitted.”).

words, C-10 could have, but did not, challenge the sections of the LAR dealing with Structure Deformation Monitoring.³³

Likewise, in its order granting the Petition, the Board found portions of five of the proposed contentions admissible—specifically, Contentions A, B, C, D, and H.³⁴ The Board then adopted a single reformulated contention, as follows:

The large-scale test program, undertaken for NextEra at the FSEL, has yielded data that are not “representative” of the progression of ASR at Seabrook. As a result, the proposed monitoring, acceptance criteria, and inspection intervals are not adequate.³⁵

Although the language of the reformulated contention does not explicitly specify the *ASR Expansion* monitoring, acceptance criteria, and inspection intervals, this is clearly the portion of the LAR to which the Board was referring. The Board explained—in no uncertain terms—that C-10’s proposed Contention H (regarding inspection intervals):

does not challenge the monitoring intervals in Table 6 [“Structure Deformation Monitoring Requirements”]—rather, it challenges the monitoring intervals in Table 5, “ASR Expansion Acceptance Criteria and Condition Monitoring Frequencies.”³⁶

The Board’s explicit statement leaves no doubt that the reformulated contention admitted by the Board was intended as a challenge to the ASR Expansion Monitoring portion of the LAR, not the Structure Deformation Monitoring portion.

³³ Furthermore, as noted above, C-10 recently waived any opportunity to challenge the NRC Staff’s evaluation of the Structure Deformation Monitoring portion of the LAR in both the Draft and Final Safety Evaluations.

³⁴ *Seabrook*, LBP-17-7, 86 NRC at 126-27.

³⁵ *Id.* at 127.

³⁶ *Id.* at 124 (emphasis added).

Thus, C-10's pleadings and the Board's admissibility order explicitly defined and limited the scope of the admitted contention as a challenge to: (1) the "representativeness" of the FSEL testing, and (2) certain aspects of the ASR Expansion Monitoring portion of the LAR.

C. Testimony and Exhibits Offered for the Purpose of Challenging the Structure Deformation Monitoring Portion of the LAR Are Irrelevant to the Admitted Contention

Pursuant to 10 C.F.R. §§ 2.319(e) and 2.337(a), the Board should exclude any testimony and exhibits offered for the purpose of challenging the Structure Deformation Monitoring portion of the LAR. As noted above, nowhere in C-10's previous filings has it raised any argument about the Structure Deformation Monitoring portion of the LAR. To raise this new argument through a new expert for the first time in written testimony or exhibits would be both irrelevant to the admitted contention and prejudicial.³⁷

The issue to be considered at the hearing is whether an alleged lack of "representativeness" of FSEL data impacts the monitoring techniques, acceptance criteria, and inspection intervals proposed for ASR Expansion Monitoring. In contrast, portions of the Saouma Report (if offered as an exhibit) would constitute evidence proffered only for the purpose of challenging the Structure Deformation Monitoring portion of the LAR. More specifically, Dr. Saouma's extended discussion of and challenges to "finite element analysis,"³⁸ also known as a "finite element model" ("FEM"), are irrelevant to the admitted contention

³⁷ See *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, (1998) ("Agency adjudications require advance notice of claims and a reasonable opportunity to rebut them. . . . Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions") (citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264–65 (1987) (plurality opinion of Marshall, J.); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553–54 (1978); *Seabrook*, ALAB-899, 28 NRC at 97 & n.11, *petition for review denied sub nom. Commonwealth of Mass. v. NRC*, 924 F.2d 311, 332–33 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991)).

³⁸ Saouma Report § 5 ("Consequential Finite Element Analyses").

because it solely relates to deformation evaluations performed under the Structure Deformation Monitoring portion of the LAR. As explained in the LAR, FEM is part of the methodology used to gauge structural deformation, and is employed in the “Stage Two – Analytical Evaluation” and “Stage Three – Detailed Evaluation” phases of the program.³⁹ In simplified terms, the FEM reconciles the original design analysis of the structure with structural deformation field measurements of the Seabrook structure.⁴⁰ Neither FEM nor the other issues raised in Dr. Saouma’s FEM critique⁴¹ are mentioned or challenged in the Petition whatsoever. Thus, this topic is far-afield from, and irrelevant to, the “key issue”⁴² raised in the admitted contention—the representativeness of data collected at the FSEL.

IV. CONCLUSION

For the foregoing reasons, the Board should exclude from the record all testimony and exhibits purporting to challenge the Structure Deformation Monitoring portion of the LAR, including but not limited to the “Finite Element Analyses” discussion in the Saouma Report. Given the schedule established for this proceeding, NextEra respectfully submits that the Board and the Parties would benefit from an expedited ruling on this Motion, well in advance of the testimony submission window (beginning June 10, 2019), so that all Parties are on notice of the proper scope of the hearing.

³⁹ Original LAR at [unnumbered PDF pages 24-26 of 73].

⁴⁰ *Id.* at [unnumbered PDF page 25 of 73].

⁴¹ *See, e.g.*, Saouma Report § 5.2 (discussing seismic probabilistic risk assessments).

⁴² *Seabrook*, LBP-17-7, 86 NRC at 127.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 23rd day of April 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

NEXTERA ENERGY SEABROOK, LLC)

(Seabrook Station Unit 1))

Docket No. 50-443-LA-2

April 23, 2019

MOTION CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), counsel for NextEra certifies that a sincere effort was made to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and certifies that such efforts have been unsuccessful. C-10 intends to oppose this Motion. The NRC Staff does not take a position on this Motion and reserves the right to file a response.

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**UNITED STATES OF AMERICA
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In the Matter of:)

NEXTERA ENERGY SEABROOK, LLC)

(Seabrook Station Unit 1))

Docket No. 50-443-LA-2

April 23, 2019

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, the foregoing “NEXTERA’S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EXHIBITS REGARDING STRUCTURE DEFORMATION MONITORING” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty

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